Judge steps down in Yorta Yorta native title case

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The Yorta Yorta native title appeal began yesterday in dramatic style with a judge agreeing to disqualify himself from the hearing because of perceived bias.

In a last-minute move on Tuesday, the Victorian Government and other groups opposing native title for the Yorta Yorta people applied to the court for Justice Ron Merkel to be disqualified.

They argued that the public might perceive the judge as biased because until two months ago he had been a trustee of the Koori Heritage Trust. Justice Merkel was due to sit alongside Chief Justice Michael Black and Justice Catherine Branson in the hearing, beginning yesterday.

But before the hearing Justice Black announced that Justice Merkel had asked that he be replaced.

This meant that the Federal Court was not required to make an order on whether Justice Merkel should be disqualified.

Later, Justice Leslie Katz, in a video link-up from Sydney, joined Justice Black and Justice Branson for the start of the hearing.

The Yorta Yorta Aboriginal people have appealed against a decision of

Justice Howard Onley in December last year that they did not have native title over their traditional land.

Mr Ron Castan QC, counsel for the Yorta Yorta community, told the full Federal Court that Justice Onley had erred in law and fact in finding that the Yorta Yorta people did not have native title over their traditional land.

He said Justice Onley had applied a test for native title that was inconsistent with both the Native Title Act and the Mabo High Court decision which proceeded the act. He said that the judge had erred in law when he ruled that the Yorta Yorta people seeking native title must show that they had followed the same laws and customs as their forebearers had in 1788, when the British Crown claimed sovereignty over their traditional lands.

Instead, Aborigines needed only to prove they occupied the same land as their forebearers, using laws and customs derived from those handed down over thousands of years, and that the native title had not been extinguished by the granting of other land title, he said.

The Yorta Yorta people are claiming almost 2,000 sq km of land in southern NSW and northern Victoria.

There are two other native title claims under appeal in the Federal Court one in north-west WA and the other in Croker Island off the Northern Territory.

Justice Merkel sat on the appeal of the Croker Island native title claim, with a decision yet to handed down.

Justice Katz is expected to fly to Melbourne for the continuation of the week-long appeal hearing tomorrow.

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